Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
BellSouth Telecommunications, Inc.	)	
Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Service by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers	)	**WC Docket No. 03-251**

REPLY COMMENTS OF MCI

Under the guise of an "emergency" petition, BellSouth asks this Commission to do what it would not – could not – do if it took the full measure of time to consider the thin evidence underlying BellSouth's claims. That is, BellSouth asks this Commission to aid it in its blatant attempt to reinforce and extend its continuing anticompetitive grip on local voice services throughout its region. BellSouth casts itself as a victim in this case, unfairly burdened by "multiple and inconsistent" state rulings. BellSouth pet. at 10. As the comments by the state public service commissions and other parties demonstrate, however, states that prevent BellSouth from tying its DSL service to its local voice service are furthering, not harming, Congress' goals in the 1996 Act. In making its barely concealed ploy for federal protection of anticompetitive conduct, BellSouth mischaracterizes the nature of the state commissions' rulings and misapplies basic concepts of preemption law. But even BellSouth cannot mischaracterize the evidence that the state commissions' rulings are harming broadband competition by preventing further investment. Quite simply, as BellSouth's own petition reveals, no such evidence exists.

A. The State Commissions Are Regulating Local Telephony, Not DSL

BellSouth insists that the state commissions are impermissibly regulating an information service, DSL-based Internet access service. This assertion fails. As a threshold matter, by their own accounts, the state commissions are *not* regulating this information service. In its response to BellSouth's emergency petition, the Louisiana PSC plainly states: "at all times the LPSC continuously recognizes and maintains that it is not, nor does it have jurisdiction to regulate the rates or pricing of BellSouth's wholesale or retail DSL service." La. PSC Comments at 1; *see also* Ga. PSC Comments at 3 ("BellSouth's position is that because it decided to package its voice and DSL services, it is able to divest state commissions of their authority over local voice service"); Ala. PSC Comments at 3 ("State Commissions are not attempting to regulate Broadband Internet Access. State Commissions are following the requirements of the 1996 Act to open the way for competition in the local service market and provide choices for the consumers."). In support of the state PSCs' viewpoint, none of the state commissions' orders imposes mandatory rates or prices on BellSouth's DSL service. Nor do the state orders bear other hallmarks of common carrier regulation of DSL services: The states here do not regulate BellSouth's management; its construction of facilities; its filing of annual reports; or its form of ownership. *See* Fla. Digital Comments at 14-15. BellSouth is free to establish these things according to the market, or its own whim; what it cannot do is arbitrarily discriminate against state citizens who choose to switch to a CLEC voice provider.

Far from targeting DSL, the state commissions are protecting and fostering competition in the local voice market -- conduct squarely within their federal mandate. States have plenary authority under § 2(b) of the 1996 Act to regulate competition in retail local voice services. BellSouth never contends otherwise. To the extent that the states' rulings have the incidental effect of imposing narrow regulatory restrictions on BellSouth's DSL service, the states possess ample authority to so regulate under federal law. As the Eastern District of Kentucky recently explained, the public service commissions' orders establish "a relatively modest interconnection-related condition for a local exchange carrier so as to ameliorate a chilling effect on competition for local telecommunications regulated by the Commission." *BellSouth Telecomms., Inc. v. Cinergy Communications Co.*, __ F. Supp. 2d ___, No. Civ. A 03-23-JMH, 2003 U. S. Dist. LEXIS 23976 at *21 (E.D. Ky. Dec. 29, 2003). Such reasonably tailored regulations, the court found in *Cinergy*, are not preempted by federal law. *Id.* Indeed, the Georgia PSC observed, any contrary rule would needlessly eviscerate state commissions' ability to regulate under the Act. *See* Ga. PSC Comments at 3 ("In short, BellSouth's position is that because it decided to package its voice and DSL services, it is able to divest state commissions of their authority over local voice service."). BellSouth asks this Commission to focus solely on Internet access service, but make no mistake: This is a battle over the future of competition in local telephony.

Moreover, given the egregious nature of BellSouth's anticompetitive conduct, the state commissions' actions were not only reasonable, but vital to maintaining competition in the local voice market. *See* MCI Comments at 3-9 (describing in detail the many methods by which BellSouth "locks in" local voice customers by threatening to terminate their DSL if they switch to a CLEC voice provider).

For example, the proceeding before the Georgia Public Service Commission "included substantial evidence on the impact of BellSouth's policy on local voice competition in Georgia." Ga. PSC Comments at 3. Based upon that evidence, the Georgia PSC found that "BellSouth's policy impairs local voice competition, and in fact, is not fair and lawful." *Id.* Specifically, the evidence showed that, over a nine-month period, some 4,900 Georgia customers had declined

CLEC voice service only to avoid the prospect of losing their BellSouth DSL service. *See* MCI's Post-Hearing Br., *Ga. PSC Order*, No. 11901-U, at 9 (filed Apr. 11, 2003) (citing Tr. at 38-39, 75). Additionally, BellSouth's practice of tying its DSL to its local voice service prevents the development of Internet-based phone service, or VoIP, by tying VoIP to its potentially worthless narrowband voice offering which BellSouth's customers soon will be able to do without.

B. The Commission Has Not Preempted This Kind of State Action.

BellSouth's contention that the *TRO*[1] has already preempted the state commissions' orders is based on a fundamental mischaracterization of the state regulations imposed. The state commissions, BellSouth alleges, impermissibly impose a newly required UNE on BellSouth, in contravention of the *TRO*. BellSouth insists that CLECs are freeloading on BellSouth, imposing technological and financial burdens while the CLECs obtain a segment of the loop at no cost. This description is, simply, wrong. The state commissions' DSL tying orders "do not require BellSouth to provide any UNEs, or anything else, to CLECS." Fla. Digital Comments at 8. None of the four state commissions to have ruled against BellSouth ordered it to unbundle the low frequency portion of its loops: All have required CLECs to pay the full cost of the loop, while allowing BellSouth to continue providing DSL service, free of charge to BellSouth, over that loop.

Once this factual misrepresentation is cleared up, it becomes obvious that BellSouth's reliance on the *TRO* is entirely unfounded. The *TRO* never addressed the situation here, where CLECs must purchase the *entire* loop but a state requires the ILEC to continue to provide, at no cost to BellSouth, DSL service to an existing customer. In the *TRO*, the Commission addressed the quite different question of whether federal law should require all ILECs to separately unbundle and lease only the low frequency portion of the copper loop. The Commission declined to impose such an unbundling requirement on a national scale, although it remains an open question whether a state could do so. But the Commission need not answer that question here: Unbundling is not in issue. Thus, BellSouth's contention that the Commission has already decided this question in the *TRO* is unsustainable.

Equally misguided is BellSouth's insistence that DSL's identity as an "interstate service" shields it from all state regulation. Because the lines between intrastate and interstate telecommunications services are never clear, states are entitled under the 1996 Act to regulate jurisdictionally mixed services where those services directly affect local telephony, the core realm of state regulation. In rejecting precisely the argument BellSouth makes in its emergency petition, the Eastern District of Kentucky recently echoed the Supreme Court's commonsense interpretation of the federal-state balance: "The Supreme Court has recognized that the Act cannot divide the world of domestic telephone service 'neatly into two hemispheres,' one consisting of interstate service, and the other consisting of intrastate service, over which the states retain exclusive jurisdiction." *BellSouth Telecomms., Inc. v. Cinergy Comm. Co.,* 2003 U.S. Dist. LEXIS 23976 at *15-*16. The court in *Cinergy* was correct. The contrary view, on the other hand, would narrow state authority and then eliminate it entirely as voice service becomes increasingly intertwined with "interstate" broadband access.

Federal law imposes no such artificial boundaries. State regulation of telecommunications is preempted only when the Commission reasonably finds that "the state regulation negates a valid federal policy" and "only to the degree necessary to achieve" that

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[1] *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16978 (2003).

policy. *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 430-31 (D.C. Cir. 1989) ("*NARUC*"). Embracing rather than obliterating the jurisdictional tension between state and federal regulation, in the 1996 Act Congress endorsed such federal-state cooperation, dubbed "collaborative federalism." In so providing, Congress expressly granted state regulators significant responsibility in implementing the 1996 Act, especially where local telephony was concerned. *See, e.g.,* 47 U.S.C. § 251(d)(3) ("Preservation of State access regulations"); *id.* § 261(b) (preservation of state regulatory powers to fulfill requirements of local competition requirements).

Using the "hook" of DSL service, BellSouth now seeks to delete these provisions of the 1996 Act. There is no authority for this Commission to do so. The state commissions' actions do not conflict with any provision in the 1996 Act. As we underscore below, BellSouth has not provided a shred of evidence that the state commissions' rulings "negate a valid federal policy." *NARUC*, 880 F.2d at 430. Nor has BellSouth even come close to showing how the state commissions' rulings will "substantially prevent" implementation of federal telecommunications policies. *See* 47 U.S.C. § 251(d)(3). In the absence of such a showing, the 1996 Act prohibits preemption of state regulations.

BellSouth's only argument in favor of preemption in this area is that allowing CLEC customers to subscribe to BellSouth's DSL will deter ILECs and CLECs from investing in broadband facilities, and therefore dampen what it describes as the "vibrant" competition in the broadband market. *See* BellSouth pet. at 2, 3. Given its obviously anticompetitive motives, it is ironic that BellSouth asks this Commission to preempt state rulings in the name of competition. That aside, as the comments filed thus far make perfectly clear, there is *zero* evidence – from BellSouth or from any other party – that the state commissions' rulings are having or will have a negative effect on investment in broadband technology. To the contrary: the evidence shows that BellSouth's actions, not those of the state commissions, are inhibiting competition, and thus investment.

By tying its last-generation narrowband voice offerings to its next-generation broadband offerings, BellSouth severely limits the growth of broadband VoIP applications that threaten its narrowband voice monopoly. If BellSouth is allowed to continue this practice, it will *suppress* demand for broadband services, and so inhibit broadband deployment. *See, e.g.,* Vonage Holdings Corp. Comments at 5-6 (describing how DSL and VoIP fuel demand for each other, facilitating widespread broadband deployment). BellSouth's practice is in that way directly in the teeth of the Commission's stated policy of promoting VoIP and broadband deployment.

BellSouth has provided not a single example of how the state commissions' rulings will deter investment in broadband facilities. Its argument amounts to a tautology: Regulation deters investment; therefore this regulation must deter investment. The only non-RBOC commenter in this proceeding to defend BellSouth's position invokes the same tautological mantra. *See generally* Comments of Catena Networks. Catena alleges that the state commissions' rulings "have slowed, and in some cases stopped, ILEC investment in new [broadband] technologies." Catena comments at 3. But Catena provides no evidence to back up this broad statement. Indeed, Catena's comments appear to demonstrate the opposite. Catena admits that it has experienced "exponential" growth since the *TRO*. *See id.* at 4 n.4. Incumbent carriers, Catena also states, "have announced intentions to increase dramatically investment in broadband technologies" since the *TRO*. *Id.* at 4-5. For example, on January 8, 2004, Verizon announced its commitment to investing $3 billion over the next two years to bring broadband to the mass market. *Id.* at 5 n.5. Despite this wealth of evidence contradicting its own position, Catena asserts – without a single statistic – that the state PSCs' rulings "will deter investment in broadband technologies." *Id.* at 6. If this alleged deterrent effect is so obvious and so damaging, why is it that neither BellSouth nor its supporters can muster even a statistic – or even a single anecdote – in their favor?

Furthermore, BellSouth asserts that compliance with the state commissions rulings is burdensome. Tellingly, however, it points to not a single specific instance of any burden – whether technological or financial – that has resulted from its new obligations. This absence of evidence is hardly surprising: No such burden exists. State commissions have uniformly found that no technological impediments hinder BellSouth's provision of DSL service to CLEC voice customers. *See, e.g., Fla. PSC Staff Recommendation*, No. 020507-TL, at 56-61; *Ga. PSC Order*, No. 11901-U, at 8-9. Strong evidence supports these findings. For example, beginning February 28, one Bell company – Qwest – *will* provide DSL service to customers who switch their voice service to a CLEC. *See Ex parte* letter from R. Jackson, Americatel Corp. to W. Mahar, FCC of Feb. 18, 2004, at 2. In addition, in the past BellSouth itself has provided stated-alone DSL service to some CLEC voice customers. *See* Vonage Holdings Corp. Comments at 12 & n.34. As for financial burdens, BellSouth's only financial burden results from its deliberate, anticompetitive decision to forego DSL income from CLEC voice customers, even though BellSouth has free access to the fully leased loop. If BellSouth is losing money, it is doing so purposefully, with the intent of ultimately locking in a monopoly market share. Indeed, the Florida PSC observed with surprise BellSouth's position that "there is *no* profit margin at which it would offer FastAccess service [to CLEC voice customers] and that it would rather lose the customer than provide FastAccess." *Fla. Staff Recommendation*, No. 020507-TL, at 24.

In contrast, as state commissions have found, there are significant burdens on CLECs that would like to provide their own DSL service. Although BellSouth blithely touts "innovative line-splitting arrangements" with DSL-only service providers, *see* BellSouth Pet. at 16, the fact of the matter is that, in many areas of the country, no viable DSL-only providers exist. This lack of options – combined with BellSouth's refusal to offer DSL services to CLEC voice customers – effectively shuts CLECs out of effective voice competition. Furthermore, prohibitive transaction costs – *e.g.*, the need to get a new email address, early termination charges by BellSouth, and a lapse in service pending connection to an alternative broadband provider – hinder customers from taking advantage of what choices do exist. *See* Vonage Holdings Corp. Comments at 18. Thus weakened, CLECs are hardly in an improved position to make long-term investments in additional or new broadband facilities.

The Commission need not and should not take the precipitous leap BellSouth urges upon it. The state rulings BellSouth here would preempt are examples of how the collaborative federalism envisioned in the 1996 Act works as it was intended. It provides certainty for investors while respecting important variations in local conditions. The state commissions' rulings at issue here – which are narrowly tailored to accomplish specific and lawful state regulatory goals – are a perfect illustration of this success. The Commission should not dismantle this effective regulatory structure, especially where, as here, the party seeking such action is acting in a glaringly anticompetitive manner, thus thwarting the very goals it ostensibly wishes to have vindicated.

CONCLUSION

For the foregoing reasons, as well as those set out in MCI's opening comments, the Commission should deny BellSouth's "Emergency Request for Declaratory Ruling."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mark D. Schneider, hereby certify that I have this 20th day of February, 2004, caused a true copy of the Reply Comments of MCI to be served on the parties listed below via first-class U.S. Mail, postage prepaid:

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